

As public defenders and criminal defense attorneys dedicated to protecting the civil liberties of Mississippians and Hattiesburg residents, we are greatly concerned about Hattiesburg Police Department's secret use of surveillance technologies, particularly its apparent use of cell-site simulators.¹ A cell-site simulator or IMSI catcher – commonly referred to as a “Stingray” – mimics a cell phone tower, forcing cell phones within its range to communicate with it, which enables the police to track your location and intercept data from your phone.²

Stingrays have been used by law enforcement for more than two decades,³ but there has been little criticism because law enforcement has gone to extreme lengths to maintain secrecy.⁴ In recent years, documents have revealed that the FBI has encouraged⁵ – sometimes, required⁶ – local law enforcement to conduct “parallel construction” for whatever information is gathered

¹ Police Chief Parker reportedly stated that he wants people to know the department has body cameras and license plate readers but not “the stingers and all the private stuff,” including “pole camera[s].” Haskel Burns, *Ordinance looks at police surveillance equipment*, Hattiesburg American (Oct. 28, 2016), available at <http://www.hattiesburgamerican.com/story/news/local/hattiesburg/2016/10/28/ordinance-looks-police-surveillance-equipment/92899430/>.

² See Stephanie K. Pell, Christopher Soghoian, *Your Secret Stingray's No Secret Anymore: The Vanishing Government Monopoly over Cell Phone Surveillance and Its Impact on National Security and Consumer Privacy*, 28 Harv. J.L. & Tech. 1, at 11-12 (2014) (“IMSI catchers can be used to identify nearby phones, locate them with extraordinary precision, intercept outgoing calls and text messages, as well as block service. . . . Cellular surveillance technology, by its very nature, tends to be invasive and over-broad in its collection of data.”), available at <http://jolt.law.harvard.edu/articles/pdf/v28/28HarvJLTech1.pdf>. See also Sam Biddle, *Long-secret Stingray Manuals Detail How Police Can Spy on Phones*, The Intercept (Sept. 12, 2016), (“[The manuals] make clear the capability of [cell-site simulators] to spy on cellphones by, at minimum, tracking their connection to the simulated tower, information about their location, and certain ‘over the air’ electronic messages sent to and from them.”), <https://theintercept.com/2016/09/12/long-secret-stingray-manuals-detail-how-police-can-spy-on-phones/>.

³ See Pell & Soghoian, *supra* note 2, at 14. See also Tsutomu Shimomura, *Catching Kevin*, WIRED (Feb. 1, 1996), <https://www.wired.com/1996/02/catching/>.

⁴ See Pell & Soghoian, *supra* note 2, at 34-40. See also, Ellen Nakashima, *Secrecy around police surveillance equipment proves a case's undoing*, The Washington Post (Feb. 22, 2015), available at https://www.washingtonpost.com/world/national-security/secrecy-around-police-surveillance-equipment-proves-a-cases-undoing/2015/02/22/ce72308a-b7ac-11e4-aa05-1ce812b3fdd2_story.html.

⁵ See e.g., Justin Fenton, *Baltimore Police used secret technology to track cellphones in thousands of cases*, The Baltimore Sun (Apr. 9, 2015) (A detective revealed the Baltimore Police Department had used Stingrays thousands of times since 2007 while following instructions from the FBI to withhold information about it from prosecutors and judges.), available at <http://www.baltimoresun.com/news/maryland/baltimore-city/bs-md-ci-stingray-case-20150408-story.html#page=1>.

⁶ See, e.g., Jenna McLaughlin, *FBI Told Cops to Recreate Evidence from Secret Cell-Phone Trackers*, The Intercept (May 5, 2016), <https://theintercept.com/2016/05/05/fbi-told-cops-to-recreate-evidence-from-secret-cell-phone-trackers/>.

with Stingrays.⁷ In other words, police are told to manufacture a chain of evidence that could have existed without using the technology so that defense attorneys and judges will never learn that a Stingray was used.⁸ In other cases where law enforcement has used Stingray technology, it has become clear that the judges were misled before signing orders allowing it.⁹ Whether “evidence laundering” or materially misleading judges, these tactics deny defendants their right to challenge arguably unconstitutional surveillance and strip from courts their role of oversight.¹⁰

Now that this technology is no longer as secret as it once was, watchdogs and defense attorneys are beginning to ask questions.¹¹ In response to suspicions that Stingrays are being used, federal, state and local law enforcement agencies aggressively resist disclosure.¹² Withholding basic information disregards the rights of Mississippians and allows the government to keep constitutional violations hidden.¹³ Department after department has eventually been

⁷ See, e.g., First Submission of Consolidated Exhibits Relating to Discovery and Suppression Issues, Exhibit 34 at 51, *United States v. Rigmaiden*, No. 08-cr-00814-DGC (D. Ariz. Jan 4, 2012), ECF No. 587-2, (Email from Denise L Medrano, Special Agent, Phoenix Field Office, to Albert A. Childress (July 17, 2008 6:01 AM): “The tech guys were able to narrow the signal to 3 apartments. Today, we will be doing as much follow up research as we can. We need to develop independent probable cause of the search warrant... FBI does not want to disclose the [redacted].”), available at <https://www.aclunc.org/sr06>; See also *Id.* Exhibit 38 at 12, ECF No. 587-3, (Email from Fred Battista, Assistant United States Attorney, to Shawna Yen (July 17, 2008 3:56 PM): “The main effort now may be to tie the target to the case without emphasis on the [redacted].”), available at <https://www.aclunc.org/sr07>.

⁸ See, e.g., Maria Kayanan, *Internal Police Emails Show Efforts to Hide Use of Cell Phone Tracking*, ACLU (June 19, 2014), <https://www.aclu.org/blog/internal-police-emails-show-efforts-hide-use-cell-phone-tracking>.

⁹ Ryan Gallagher, *Feds Accused of Hiding Information from Judges about Covert Cellphone Tracking Tool*, Slate (Mar. 28, 2013), http://www.slate.com/blogs/future_tense/2013/03/28/stingray_surveillance_technology_used_without_proper_approval_report.html.

¹⁰ During pretrial proceedings for a case in which the ACLU eventually filed suit to seek compliance with a records request for information regarding a sheriff department’s use of Stingray technology, the department admitted that it possesses the technology and that it has used it without obtaining any court authorization at all, much less a warrant. See Response to Petitioner’s First Set of Requests for Admissions at 7, ¶15, *ACLU of Nor. Cal. V. Sacramento County Sheriff’s Dep’t.*, No. 34-2015-80002040 (Cal. Super. Ct. filed Mar. 10, 2015), available at https://www.aclunc.org/sites/default/files/20150911-sacramento_sherriffs_response.pdf.

¹¹ See Joseph Goldstein, *New York Police Are Using Covert Cellphone Trackers, Civil Liberties Group Says*, New York Times (Feb. 11, 2016) available at <http://www.nytimes.com/2016/02/12/nyregion/new-york-police-dept-cellphone-tracking-stingrays.html>

¹² See e.g., Devlin Barrett, *Americans’ Cellphones Targeted in Secret U.S. Spy Program*, The Wall Street Journal (Nov. 13, 2014), available at <http://www.wsj.com/articles/americans-cellphones-targeted-in-secret-u-s-spy-program-1415917533>; Taylor Killough, *State Police Acknowledge Use of Cell Phone Tracking Device*, Indiana Public Media (Dec. 12, 2013), available at <http://indianapublicmedia.org/news/state-police-respond-investigation-tracking-device-59918/>; Richard Winton, *Anaheim police, Sacramento sheriff sued over surveillance device*, L.A. Times (Mar. 10, 2015), available at <http://www.latimes.com/local/lanow/la-me-l-secret-phone-surveillance-device-20150310-story.html>.

¹³ It is not sufficient for Police Chief Parker to have publicly stated that the department gets court approval. See Haskell Burns, *supra*, note 1. Indeed, chief law enforcement officers of other agencies have made the same

found to have possessed this technology for years¹⁴ and to have utilized it without ever obtaining a warrant,¹⁵ much less disclosing its use of the technology to the courts.¹⁶

Earlier this year, a federal judge in New York ruled that the use of Stingrays without a warrant violates the Fourth Amendment.¹⁷ Also this year, an appellate state court in Maryland held the same.¹⁸ These are issues on which Mississippi courts have not ruled, but at the very least, the Fourth Amendment of the U.S. Constitution and Article III Section 23 of the Mississippi Constitution¹⁹ require that the government not hide this surveillance technology from the courts. Yet that is exactly what law enforcement agencies throughout the nation are doing in

assurances, and the records eventually released have directly contradicted them. *See e.g.*, Kate Martin, *Documents: Tacoma police using surveillance device to sweep up cellphone data*, The News Tribune (Aug. 26, 2014) (Local police insisted that they only use Stingrays with approval, but local judges stated that they “had never heard of it.”), available at <http://www.thenewstribune.com/news/local/article25878184.html>; *See also* NYCLU, *Erie County Sheriff Records Reveal Invasive Use of ‘Stingray’ Technology* (Apr. 7, 2015) (Records revealed a sheriff’s office in New York had used Stingrays 47 times, and despite the sheriff’s statements to the media and the legislature ensuring “judicial review,” a warrant wasn’t secured once.), <http://www.nyclu.org/news/erie-county-sheriff-records-reveal-invasive-use-of-stingray-technology>.

¹⁴ *See e.g.*, Bruce Vielmetti, *Groups decry Milwaukee police's warrantless use of 'Stingray' tracking*, Journal Sentinel (Feb. 1, 2016), available at <http://archive.jsonline.com/news/crime/groups-decry-milwaukee-polices-warrantless-use-of-stingray-tracking-b99660842z1-367246261.html>; Jessica Lussenhop, *St. Louis Police Have Used StingRay Technology for Years – They Just Won't Talk About It*, The Riverfront Times (May 20, 2015), available at <http://www.riverfronttimes.com/newsblog/2015/05/20/st-louis-police-have-used-stingray-technology-for-years-they-just-wont-talk-about-it>.

¹⁵ *See e.g.*, Kim Zetter, *Florida Cops' Secret Weapon: Warrantless Cellphone Tracking*, WIRED (Mar. 3, 2014), <https://www.wired.com/2014/03/stingray/>.

¹⁶ *See* Brad Heath, *Police secretly track cellphones to solve routine crimes*, USA Today (Aug. 24, 2015) available at <http://www.usatoday.com/story/news/2015/08/23/baltimore-police-stingray-cell-surveillance/31994181/>.

¹⁷ *United States v. Lambis*, No. 15CR734, 2016 WL 3870940 (S.D.N.Y. Jul. 12, 2016). *See* Nate Raymond, *In first, U.S. judge throws out cell phone 'stingray' evidence*, Reuters (Jul. 13, 2016), available at <http://www.reuters.com/article/us-usa-crime-stingray-idUSKCN0ZS2VI>.

¹⁸ *State v. Andrews*, 227 Md. App. 350 (2016). *See* Brad Heath, *200 imprisoned based on illegal cellphone tracking, review finds*, USA Today (Mar. 31, 2016), available at <http://www.usatoday.com/story/news/2016/03/31/200-imprisoned-based-illegal-cellphone-tracking-review-finds/82489300/>.

¹⁹ *See generally* *Graves v. State*, 708 So. 2d 858, 861 (Miss. 1997) (“[Article 3,] Section 23 of the Mississippi Constitution provides greater protections to our citizens than those found within the United States Constitution”); *Penick v. State*, 440 So. 2d 547, 551-52 (Miss. 1983) (“The words of our Mississippi Constitution are not balloons to be blown up or deflated every time, and precisely in accord with the interpretation the U.S. Supreme Court, following some tortuous trail, is constrained to place upon similar words in the U.S. Constitution. Putting the matter another way, although the sheet music might appear the same, in reading the musical score of our Mississippi Constitution we are not required to play the same tune the U.S. Supreme Court may play in its rendition from the musical score of the U.S. Constitution.”).

their respective jurisdictions.²⁰ In fact, courts have sharply criticized law enforcement for misleading judges about their use of stingrays.²¹

It is also important to note that when data regarding the deployment of Stingrays has come to light, that data has shown local police departments frequently use the devices to target certain communities, like communities of color and low income.²² The ability to use these technologies in secret paves the way for their discriminatory use.

If Mississippi courts are ever to determine if Stingrays may be used and, if so, when and how they may be used, a certain level of transparency in law enforcement must exist. Hattiesburg Police Department's failure to inform the public of basic details regarding its use of surveillance technology undermines democracy, and a failure to fully inform judges and provide defense counsel notice is completely incompatible with the U.S. Constitution. The Police Department, at the very least, must assure the community it serves that court oversight is not a farce. Our justice system cannot function if judges and defense attorneys are kept in the dark about the surveillance technology police are using. Anything less than complete disclosure regarding this technologies' use is an affront to fundamental privacy rights and the right of all Mississippians to be free from an overreaching government.

²⁰ See Jessica Glenza and Nicky Woolf, *Stingray spying: FBI's secret deal with police hides phone dragnet from courts*, The Guardian (Apr. 10, 2015) ("Multiple non-disclosure agreements (NDAs) revealed in **Florida, New York and Maryland** this week show federal authorities effectively binding local law enforcement from disclosing any information – even to judges – about the cellphone dragnet technology, its collection capabilities or its existence.") (emphasis added), <https://www.theguardian.com/us-news/2015/apr/10/stingray-spying-fbi-phone-drag-net-police>; Devin Coldewey, *'StingRay': Records Show Secret Cellphone Surveillance by Calif. Cops*, NBC News (Mar. 14, 2014), available at <http://www.nbcnews.com/tech/security/stingray-records-show-secret-cellphone-surveillance-calif-cops-n52181>.

²¹ See e.g., Alex Emmons, *Maryland Appellate Court Rebukes Police for Concealing Use of Stingrays*, The Intercept (Mar. 31, 2016), <https://theintercept.com/2016/03/31/maryland-appellate-court-rebukes-police-for-concealing-use-of-stingrays/>.

²² See George Joseph, *Racial Disparities in Police 'Stingray' Surveillance*, Mapped, City Lab (Oct. 18, 2016), <http://www.citylab.com/crime/2016/10/racial-disparities-in-police-stingray-surveillance-mapped/502715/> ("In Baltimore, Tallahassee, and Milwaukee, this disproportionate Stingray surveillance means that tens of thousands of people in low-income and majority-non-white neighborhoods are far more likely to have their locations and call data seized by police, even if they are not suspected of committing a crime.").

Sincerely,



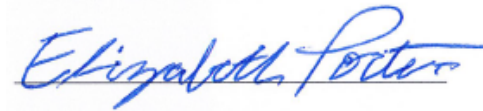
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